

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

STEVEN RAY ROOT,

Defendant.

NO: 2:14-CR-0001-TOR-2

ORDER RE: PRETRIAL MOTIONS

BEFORE THE COURT are Defendant's Motion for Bill of Particulars (ECF No. 141), Motion to Suppress Evidence Seized (ECF No. 142), Motion to Dismiss/Challenge Sufficiency of Indictment (ECF No. 167), Motion to Suppress Pole Camera Evidence (ECF No. 168), Motion to Dismiss Case re: Speedy Trial Violation (ECF No. 171), Motion to Suppress Statements (ECF No. 188), and Motion for Disclosure of Brady Material (ECF No. 189), as well as the Government's responsive briefing on each motion. A pretrial conference and evidentiary hearing was held on September 19, 2014, in Spokane. The Government was represented by Caitlin A. Baunsgard. The Defendant was present

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1 with his counsel, Douglas D. Phelps. The Court has reviewed the motions and
2 accompanying pleadings, heard from counsel and is fully informed.

3 **1. Motion for Bill of Particulars (ECF No. 141)**

4 Defendant seeks specific information by which the United States seeks to
5 prove the case against him. For instance, Defendant seeks the specific dates,
6 statements, overt acts, events, and conversations upon which the prosecution will
7 rely to establish the charged conspiracy. ECF No. 141 at 1–3.

8 A bill of particulars has three purposes: to apprise the defendant of the
9 specific charges being presented so as to minimize surprise at trial, to aid the
10 defendant in preparing for trial, and to protect against double jeopardy. *United*
11 *States v. Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985) (citing *United States v. Long*,
12 706 F.2d 1044, 1054 (9th Cir. 1983)); *United States v. Ayers*, 924 F.2d 1468,
13 1483–84 (9th Cir. 1991). In general, where the indictment notifies the defendant
14 of the charges against her and the approximate dates of her alleged illegal conduct,
15 a bill of particulars is not warranted to ascertain the exact dates of the conduct.
16 *United States v. DiCesare*, 765 F.2d 890, 897–898 (9th Cir. 1985) (Defendants
17 “requested a bill for three reasons: (1) to obtain the names of any unknown
18 coconspirators; (2) to determine the exact date on which the conspiracy allegedly
19 began; and (3) to delineate all other overt acts that comprised the charged activity.
20 These reasons, however, do not warrant a bill of particulars.”) (citations omitted).

1 The Superseding Indictment (combined with the discovery provided in this
2 case) sufficiently informs Defendant of the specific charges being presented so as
3 to minimize surprise at trial, to aid the defendant in preparing for trial, and to
4 protect against double jeopardy. This motion is denied.

5 **2. Motion to Suppress Evidence Seized (ECF No. 142)**

6 Defendant seeks an order suppressing all evidence obtained during the
7 execution of a search warrant at his residence and car. He contends the affidavit in
8 support of the warrant (reproduced at ECF No. 142 at 45–51) did not establish
9 sufficient probable cause.

10 Under the Fourth Amendment, a search warrant may not issue without
11 probable cause. U.S. CONST. amend. IV. The determination whether probable
12 cause exists is a “practical, common-sense decision” made in light of the totality of
13 the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). In determining
14 whether a search warrant was based upon probable cause, this Court is “limited to
15 the information and circumstances contained within the four corners of the
16 underlying affidavit.” *Crowe v. Cnty of San Diego*, 608 F.3d 406, 434 (9th Cir.
17 2010) (quoting *United States v. Stanert*, 762 F.2d 775, 778, *amended on other*
18 *grounds*, 769 F.2d 1410 (9th Cir. 1985)).

19 Review of a magistrate judge's determination that probable cause existed for
20 a warrant is deferential; “the duty of a reviewing court is simply to ensure that the

1 magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause
2 existed.” *Gates*, 462 U.S. at 238–39; *see also United States v. Kelley*, 482 F.3d
3 1047, 1050 (9th Cir. 2007) (“Normally, we do not ‘flyspeck’ the affidavit
4 supporting a search warrant through *de novo* review; rather, the magistrate judge's
5 determination should be paid great deference.” (internal quotation marks omitted)).

6 For probable cause to exist, a magistrate need not determine that the
7 evidence sought is *in fact* on the premises to be searched, or that the
8 evidence is more likely than not to be found where the search takes place.
The magistrate need only conclude that it would be reasonable to seek the
evidence in the place indicated in the affidavit.

9 *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004) (quoting *United States*
10 *v. Peacock*, 761 F.2d 1313, 1315 (9th Cir. 1985), *overruled on other grounds*,
11 *Gomez v. United States*, 490 U.S. 858 (1989)) (emphasis in original). In
12 evaluating affidavits which, as here, contain hearsay information supplied by a
13 witness to a police officer, the magistrate’s task “is simply to make a practical,
14 common-sense decision whether, given all the circumstances set forth in the
15 affidavit before him, including the ‘veracity’ and ‘basis for knowledge’ of person[]
16 supplying hearsay information, there is a fair probability that contraband or
17 evidence of a crime will be found in a particular place.” *Gates*, 462 U.S. at 238;
18 *see also United States v. Miller*, 753 F.2d 1475, 1479 (9th Cir. 1985).

19 In this case, the victim’s testimony placed her in Defendant’s house
20 overnight where she observed substantial quantities of methamphetamine as well

1 as firearms, where she smoked methamphetamine with Defendant, and during
2 which time Defendant told her that he had obtained the house in exchange for
3 \$25,000 in methamphetamine. Satisfying one prong of the *Gates* analysis, the
4 victim had a strong basis of knowledge: recent first-hand observation of
5 contraband and evidence in Defendant's residence.

6 Defendant's argument, as focused in his supplemental briefing, centers on
7 the second *Gates* prong. He argues there were insufficient indicia of the veracity
8 of the victim's statements because law enforcement officers failed to disclose the
9 victim's criminal history in the affidavit. Intentional or reckless omissions may
10 negate the showing of probable cause in a search warrant. *See United States v.*
11 *Estrada*, 733 F.2d 683, 686 (9th Cir. 1984). It is Defendant's burden to make a
12 "substantial showing" that the omissions were intentional or reckless; his
13 allegations must be accompanied by an offer of proof. *United States v. Chavez-*
14 *Miranda*, 306 F.3d 973, 979 (9th Cir. 2002). Defendant has offered no proof
15 beyond his assertions that the Deputy James Pelissier, in swearing out the affidavit,
16 intentionally or recklessly omitted information about the victim's past criminal
17 convictions. ECF No. 166

18 Further, Defendant must show that such omissions, even if they were
19 intentional or reckless, undermined the sufficiency of the affidavit. *See Estrada*,
20 733 F.2d at 686. The victim's criminal record consists of juvenile convictions for

1 third-degree possession of stolen property, third-degree theft, and third-degree
2 malicious mischief. None of these crimes bear on the honesty or credibility of the
3 victim. *See, e.g., United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982)
4 (“Generally, crimes of violence, theft crimes, and crimes of stealth do not involve
5 dishonesty or false statement . . . [and therefore] do not bear directly on the
6 likelihood that the defendant will testify truthfully.” (internal citations and
7 quotation marks omitted)). Nor does the fact that victim admitted to using
8 methamphetamine with Defendant impinge her credibility. *See, e.g., Estrada*, 733
9 F.2d at 686 (“Admissions of crimes . . . carry their own indicia of credibility—
10 sufficient at least to support a finding of probable cause to search.”) (quoting
11 *United States v. Harris*, 403 U.S. 573, 583 (1971)). Adding to her credibility, the
12 victim positively identified Defendant’s car and house to the police, and she
13 showed physical scrapes and bruising corroborating her statements regarding the
14 assault. The magistrate had sufficient indications of the veracity and base of
15 knowledge of the victim’s statements to conclude, as a matter of common sense,
16 that it was fairly probable the drugs and guns were located in Defendant’s
17 residence.

18 Finally, Defendant contends that even if there was probable cause to issue a
19 warrant to search his house, there was not probable cause to issue a warrant to
20 search his car. The totality of the circumstances in this case also made it

1 reasonable for the magistrate to conclude it was fairly probable that the car
2 contained contraband or evidence of drug sales. At the time Defendant was
3 stopped, he admitted he tried to evade police by turning onto a dirt road and
4 accelerating away. Defendant was immediately arrested by the investigating
5 officers on a felony warrant out of Idaho charging him with possession of a
6 controlled substance with intent to distribute. Given this information
7 demonstrating Defendant's possible connection with drug trafficking and his
8 expressed intension to avoid police contact, Deputy Pelissier's statement that
9 narcotic users will often travel with narcotics, and the victim's statements
10 regarding the large zip-lock of methamphetamine, the guns, and Defendant's
11 comment that he obtained the house in exchange for \$25,000 of methamphetamine,
12 it was reasonable for the magistrate to conclude that Defendant was in the business
13 of selling methamphetamine and that he would likely use his car to further that
14 enterprise. As such, the magistrate had a substantial basis for concluding that
15 Defendant's car contained contraband or evidence of his alleged trafficking.

16 There is also no basis in the record for seriously contending that the good
17 faith exception to the exclusionary rule does not apply. *United States v. Leon*, 468
18 U.S. 897 (1984).

19 Accordingly, Defendant's motion to suppress evidence seized pursuant to
20 the warrant is denied.

1 **3. Motion to Dismiss/Challenge Sufficiency of Indictment (ECF No. 167)**

2 Defendant contends the indictment against him must be dismissed as it does
3 “not charge a necessary element” of the offense and all the elements have not been
4 submitted to the grand jury. ECF No. 167. Defendant reasons that simply
5 charging “50 grams or more of pure (actual) methamphetamine” does not allow
6 him to make an informed decision regarding possible sentences and specifically the
7 upper limits of the range of punishment. *Id.* at 3–4.

8 The United States asserts the indictment properly asserts the elements of the
9 offense and the quantity necessary for the punishment sought. ECF No. 202.

10 Defendant is charged in count 1 of the superseding indictment with
11 conspiracy to possess with intent to distribute 50 grams or more of pure (actual)
12 methamphetamine. ECF No. 172. The elements of a drug conspiracy under 21
13 U.S.C. § 846 are (1) there was an agreement to accomplish an objective made
14 criminal by § 841(a)(1), which prohibits the possession with intent to distribute a
15 controlled substance; and (2) the defendant intended to commit the underlying
16 offense. *See United States v. Suarez*, 682 F.3d 1214, 1219 (9th Cir. 2012). There
17 is no requirement to prove an overt act in furtherance of the conspiracy, an illegal
18 agreement alone is sufficient. *Id.* (citing *United States v. Shabani*, 513 U.S. 10, 15-
19 16 (1994)). Defendant correctly observes that the type and quantity of drugs
20 involved determines the statutory penalty associated with the crime, 21 U.S.C.

1 § 841(b), and must be submitted to the jury (grand and petite) in order for
2 increased statutory maximum penalties to apply. *See United States v. Cortes*, 757
3 F.3d 850, 861 (9th Cir. 2014) (*citing Apprendi v. New Jersey*, 530 U.S. 466
4 (2000)). The Supreme Court has further held:

5 [] *Apprendi* 's definition of “elements” necessarily includes not only
6 facts that increase the ceiling, but also those that increase the floor.
7 Both kinds of facts alter the prescribed range of sentences to which a
8 defendant is exposed and do so in a manner that aggravates the
punishment. Facts that increase the mandatory minimum sentence are
therefore elements and must be submitted to the jury and found
beyond a reasonable doubt.

9 *Alleyne v. United States*, 133 S.Ct. 2151, 2158 (2013) (citations omitted). But
10 here, the Superseding Indictment alleges the type and quantity of controlled
11 substance which would invoke the highest penalty under the statute—10 years to
12 life imprisonment. There is no showing that the United States did not present
13 evidence as to the type and quantity of drugs here.

14 Defendant’s complaint that he cannot calculate where within that range his
15 potential sentence will lie misses the mark, too. The jury does not decide the
16 ultimate sentence, but only the operative facts that will inform the court as to the
17 range of sentences available. Since *United States v. Booker*, 543 U.S. 220 (2005),
18 the sentencing guidelines are only advisory—a district court must correctly
19 calculate the guideline range before imposing a reasonable sentence. *See United*
20

1 *States v. Carty*, 520 F.3d 984, 991–94 (9th Cir. 2008). Defendant’s motion is
2 denied.

3 **4. Motion to Suppress Pole Camera Evidence (ECF No. 168)**

4 Defendant contends that the warrantless installation and use of a pole camera
5 to continuously record all activity in the public alleyway behind his house
6 constituted a warrantless search under the Fourth Amendment. He argues such a
7 search is an unreasonable intrusion into his privacy interests and therefore all
8 evidence obtained from the camera must be suppressed.

9 The Fourth Amendment protects “[t]he right of the people to be secure in
10 their persons, houses, papers, and effects against unreasonable searches and
11 seizures.” U.S. CONST. amend. IV. “[A] Fourth Amendment search occurs when
12 the government violates a subjective expectation of privacy that society recognizes
13 as reasonable.” *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v.*
14 *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)) (quoted in *United*
15 *States v. Gonzalez*, 328 F.3d 543, 546 (9th Cir. 2003)). The Supreme Court
16 recently held in *United States v. Jones* that, while the reasonable expectation of
17 privacy test is not the exclusive test for evaluating whether a Fourth Amendment
18 search occurred, cases “involving merely the transmission of electronic signals
19 without trespass would *remain* subject to the [reasonable expectation of privacy]
20 analysis.” 132 S.Ct. 945, 953 (2012) (emphasis in original). As such, to determine

1 whether a search was conducted under the Fourth Amendment in this case, this
2 Court must determine whether Defendant had a “reasonable expectation of
3 privacy” in the location and activities observed by the pole camera.

4 “[W]hat a person knowingly exposes to the public, even in his own home or
5 office, is not a subject of Fourth Amendment protection.” *Katz*, 389 U.S. at 351.
6 Law enforcement agents may use their resources to conduct surveillance where
7 they have a legal right to occupy. *See, e.g., Florida v. Riley*, 488 U.S. 445, 449
8 (1989) (“[T]he police may see what may be seen ‘from a public vantage point
9 where [they have] a right to be’” (quoting *California v. Ciraolo*, 476 U.S. 207,
10 213 (1986))). “A person has a stronger claim to a reasonable expectation of
11 privacy from video surveillance than against a manual search.” *United States v.*
12 *Gonzalez*, 328 F.3d 543, 548 (9th Cir. 2003) (citing *United States v. Taketa*, 923
13 F.2d 665, 675 (9th Cir. 1991)) (noting that the Ninth Circuit has held that the
14 Fourth Amendment forbids warrantless videotaping of private offices and hotel
15 rooms). However, videotaping in public places does not violate the Fourth
16 Amendment. *Id.*; *see also Jones*, 132 S. Ct. at 953 (“This Court has to date not
17 deviated from the understanding that mere visual observation does not constitute a
18 search.”).

19 For example, a district court found that law enforcement officials violated a
20 defendant’s reasonable expectation of privacy where a neighbor acting for the state

1 conducted round-the-clock video surveillance of defendant's fenced back yard for
2 fifty-six days. *Shafer v. City of Boulder*, 896 F. Supp. 2d 915 (D. Nev. 2012).
3 Similarly, in affirming a conviction based on evidence derived through video
4 surveillance of the defendant's back yard from a camera placed on a power pole,
5 the Fifth Circuit held that: (1) the video surveillance constituted a search for
6 Fourth Amendment purposes because he had a reasonable expectation of freedom
7 from such surveillance in his back yard; but (2) the search warrant authorizing the
8 surveillance was proper and did not violate defendant's Fourth Amendment rights.
9 *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987). However, the
10 Tenth Circuit held that warrantless installation of silent video surveillance cameras
11 on telephone poles outside an accused narcotics offender's house, and outside the
12 house of another person, was held not to violate the accused's Fourth Amendment
13 rights. *United States v. Jackson*, 213 F.3d 1269 (10th Cir. 2000) (noting that the
14 cameras could not view within the houses and could observe only what any
15 passerby would easily have been able to observe, thus, concluding that the accused
16 had no reasonable expectation of privacy intruded upon by the cameras), *vacated*
17 *on different grounds*, 531 U.S. 1033 (2000).

18 The evidence presented at the suppression hearing demonstrated that the
19 pole camera only recorded activity that occurred in the public alleyway behind
20 Defendant's detached garage. No law enforcement agent trespassed on any

1 property in which Defendant had a privacy interest while installing the camera.¹

2 The position of the camera was such that it could not observe more than the roof of
3 Defendant's garage and the alleyway directly adjacent to the garage. While the
4 pole camera was capable of zooming and panning, FBI Special Agent Edward
5 Jacobson offered uncontradicted testimony that the investigating officers never
6 manipulated the camera to observe any area beyond the alleyway. Indeed, any
7 further observation of the Defendant's property was obscured by trees as well as a
8 neighboring house and detached garage located directly between the pole camera
9 and Defendant's own house and garage. See Exhibits A and C. Special Agent
10 Jacobson testified that the camera could not and did not observe the front or back
11 door of the house and none of its windows. See Exhibit C as illustrative of the pan
12 toward the house, but the view does not even come close to the house. Indeed,
13 based on his testimony, the camera did not view the street in front of the house
14 either. Based on the photographs introduced, as well as Special Agent Jacobson's
15 testimony regarding the location of the camera and the intervening property, the
16 Court concludes the camera did not directly observe Defendant's property or
17 activities which occurred on his property or inside his home. Instead, the camera

18 ¹ The camera was mounted on a utility pole owned by a utility company and
19 located on its easement 150 to 200 yards away from the property. The utility
20 company consented to the installation of the camera on the pole.

1 only observed activity which occurred in the public alleyway behind his garage.
2 Defendant does not have a legitimate expectation of privacy in activities which
3 occurred in that public alleyway, readily observable by any passerby. As such,
4 Defendant's motion to suppress the pole camera evidence is denied.

5 **5. Motion to Dismiss Case Re: Speedy Trial Violation (ECF No. 171)**

6 Defendant contends he has been continuously held in custody since August
7 6, 2013, and that his speedy trial rights have been violated such that the charges
8 should be dismissed against him. ECF No. 171 at 7. He asserts violations of Fed.
9 R. Crim. P. 48(b), the Sixth Amendment, and 18 U.S.C. § 3161(c)(1).

10 The grand jury issued an indictment against the Defendant on January 7,
11 2014. ECF No. 31. Defendant did not appear in this judicial district on the charge
12 until March 18, 2014. ECF No. 83. Prior to that time, Defendant had been held in
13 custody on other charges by other jurisdictions, including Whitman County,
14 Washington, and the District of Idaho. See ECF No. 196-1. Once Defendant was
15 brought to this court to answer to the charges, less than forty nine days elapsed
16 before the court granted a co-defendant's motion to continue the trial. The Court
17 entered a finding declaring excludable under the speedy trial clock the time from
18 May 1, 2014, when the motion was filed, until July 28, 2014, when the new trial
19 was scheduled. ECF No. 124. Defendant signed a written waiver of his speedy
20 trial rights, agreeing to this continuance. ECF No. 127. Defendant later sought a

1 continuance, which the Court granted and declared excludable under the speedy
2 trial clock the period from July 7, 2014, when the motion was filed, until
3 September 29, 2014, the new trial date. ECF No. 158. Defendant again signed a
4 written waiver agreeing to this continuance. ECF No. 150. Accordingly, there has
5 been no violation of the Speedy Trial Act, 18 U.S.C. § 3161(c)(1), requirement that
6 Defendant be brought to trial within seventy days (absent excludable delay).

7 With respect to a challenge based on defendant's speedy trial rights under the
8 Sixth Amendment, the court considers four factors: (1) the length of the delay; (2)
9 the reason for the delay; (3) the defendant's assertion of speedy trial rights; (4) and
10 prejudice as a result of the delay. *Doggett v. United States*, 505 U.S. 647, 651–52
11 (1992). A presumptively prejudicial length of delay must be shown to consider the
12 remaining factors. *Id.* Courts generally have found that delays approaching one
13 year, between indictment and trial, are presumptively prejudicial. *See United*
14 *States v. Gregory*, 322 F.3d 1157, 1161–62 (9th Cir. 2003). A primary reason for
15 the delay in this case was defendant's pretrial detention in the District of Idaho and
16 the length of time necessary to resolve those charges. The remaining delay is
17 attributed to the Defendant's own need for trial preparation or that of his co-
18 defendants' with which he agreed. Thus, Defendant has not shown that the
19 government's conduct caused the delay, or most importantly, that he suffered any
20 actual prejudice as a result.

1 Dismissal under Rule 48(b) is likewise unwarranted in this case. A Rule
2 48(b) dismissal should be imposed only in extreme circumstances. *United States v.*
3 *Sears, Roebuck and Co., Inc.*, 877 F.2d 734, 738 (9th Cir. 1989) (dismissal with
4 prejudice is proper only after a “forewarning of the consequences” of further
5 delay). No such circumstances exist in this case. Defendant’s motion is denied.

6 **6. Motion to Suppress Statements (ECF No. 188)**

7 Defendant seeks to suppress certain statements he made to state officers
8 when he was arrested on August 6, 2014, on state charges. ECF No. 18. The
9 United States agrees that it will not introduce any of those statements in its case-in-
10 chief.

11 Accordingly, Defendant’s motion is denied as moot.

12 **7. Motion for Disclosure of Brady Material (ECF No. 189)**

13 Defendant complains that he has not received all the Brady material he is
14 entitled. ECF No. 189. The United States responds generally that all Brady
15 material has been provided or will be provided as it is located or identified relative
16 to a particular witness that will be called at trial. “The defendant bears the initial
17 burden of producing some evidence to support an inference that the government
18 possessed or knew about the *Brady* material.” *United States v. Pelisamen*, 641
19 F.3d 399, 408 (9th Cir. 2011) (internal quotation marks omitted). Defendant has
20

1 not produced any evidence that the government possesses or knows of any
2 undisclosed *Brady* material. Accordingly, Defendant's motion is denied.

3 **IT IS HEREBY ORDERED:**

- 4 1. Defendant's Motion for Bill of Particulars (ECF No. 141) is **DENIED**.
5 2. Defendant's Motion to Suppress Evidence Seized (ECF No. 142) is
6 **DENIED**.
7 3. Defendant's Motion to Dismiss/Challenge Sufficiency of Indictment
8 (ECF No. 167) is **DENIED**.
9 4. Defendant's Motion to Suppress Pole Camera Evidence (ECF No. 168) is
10 **DENIED**.
11 5. Defendant's Motion to Dismiss Case re: Speedy Trial Violation (ECF
12 No. 171) is **DENIED**.
13 6. Defendant's Motion to Suppress Statements (ECF No. 188) is **DENIED**.
14 7. Defendant's Motion for Disclosure of Brady Material (ECF No. 189) is
15 **DENIED**.

16 The District Court Executive is hereby directed to enter this Order and furnish
17 copies to counsel.

18 **DATED** September 22, 2014



Thomas O. Rice
THOMAS O. RICE
United States District Judge